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No. 35418-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Tina Weinman,

Appellant.

Kittitas County Superior Court Cause No. 16-1-00190-3

The Honorable Judge Scott R. Sparks

Appellant's Opening Brief

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ISSUE AND ASSIGNMENTS OF ERROR

1. The sentencing court improperly denied Ms. Weinman a Drug Offender Sentencing Alternative (DOSA) sentence.
2. Ms. Weinman's prison sentence was entered in violation of her Fourteenth Amendment right to due process.
3. The sentencing judge improperly penalized Ms. Weinman for exercising her right to trial.
4. Ms. Weinman's prison sentence improperly burdened her Sixth and Fourteenth Amendment right to a jury trial.
5. Ms. Weinman's prison sentence improperly burdened her state constitutional right to a jury trial under Wash. Const. art. I, §§21 and 22.

ISSUE: An accused person may not be penalized for exercising a constitutional right. Did the sentencing judge improperly find Ms. Weinman's DOSA request "incompatible" with her decision to go to trial?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Tina Weinman's friend Elsa Mora Rodriguez lost her children following a drug arrest. RP 505. When the two women encountered each other in a parking lot, Rodriguez cried and confided in Ms. Weinman. RP 505.

Over the next few weeks, Rodriguez threatened suicide and other self-harm. RP 506-507. She asked Ms. Weinman to help her get drugs, and said she needed methamphetamine so she could cope emotionally. RP 509-510. This occurred repeatedly. RP 509-513. When Rodriguez threatened self-harm, Ms. Weinman sometimes gave in and obtained drugs for her. RP 509, 627. On occasion, the two women used drugs together. RP 511.

At other times, Ms. Weinman refused to help Rodriguez get drugs. RP 509. Previously, the two women had tried to help each other stay clean. RP 508. Now, however, when Ms. Weinman refused to get drugs for Rodriguez, she would not see her friend for days and worried that Rodriguez would carry through on her threats to harm herself. RP 509. Ms. Weinman was also struggling with her own addiction, having relapsed after the death of her mother. RP 494.

Ms. Weinman later learned that three of her encounters with Rodriguez were police-sanctioned controlled buys, with Rodriguez

working as a confidential informant. Ex. 5, Supp. CP; RP 510-513. The other occasions on which the two women used drugs together were unrelated to Rodriguez's work as an informant. RP 628-629.

Ms. Weinman was charged with three counts of delivery. CP 11. She elected to go to trial.

In her testimony, Ms. Weinman admitted involvement in two of the transactions. RP 510-513, 517. She also outlined steps she'd taken toward sobriety, including completion of a residential treatment program and aftercare. RP 494-495. She did not claim that she could achieve lifetime sobriety without assistance. RP 493-518.

The jury acquitted her of one count,¹ and returned guilty verdicts on the other two charges. CP 61-67. Jurors also found that the crimes occurred in a protected zone (near a school bus route). CP 64, 66.

At sentencing, Ms. Weinman requested a treatment-based prison sentence under the Drug Offender Sentencing Alternative (DOSA). CP 68-79. The sentencing judge refused. RP 631-632.

The judge found Ms. Weinman's DOSA request "incompatible" with her decision to go to trial:

[Y]ou're asserting here today that you have been an addict and you've been in treatment and that you need my help in getting that

¹ The jury convicted her codefendant on that charge. He had provided drugs to Rodriguez in Ms. Weinman's presence. RP 517.

treatment. But when you did the trial, you were asserting that you had not committed a crime. Now that you're saying you did, you were saying you didn't commit a crime, okay? And you were asserting that you didn't need the system's help -- the Court's help in getting treatment because you were doing it on your own. They're incompatible. They're incompatible. You can't do that... So, I'm going to deny the request for DOSA, but I will certainly take into account that you have a chemical dependency that contributed to this offense.
RP 631-632.

Ms. Weinman appealed. CP 92.

ARGUMENT

THE SENTENCING COURT IMPROPERLY PENALIZED MS. WEINMAN FOR EXERCISING HER CONSTITUTIONAL RIGHT TO TRIAL WHEN DENYING HER DOSA REQUEST.

The government may not penalize an accused person's exercise of a constitutional right. *U. S. v. Goodwin*, 457 U.S. 368, 372, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982). It is "a due process violation of the most basic sort" when a person is punished "because [she or] he has done what the law plainly allows." *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 668, 54 L. Ed. 2d 604 (1978).

An increased penalty may not be imposed based on an accused person's exercise of the right to trial. *United States v. Jackson*, 390 U.S. 570, 573, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968). In *Jackson*, the Supreme Court examined the Federal Kidnapping Act, which authorized imposition of the death penalty for an offender convicted following a jury

trial.² *Id.* The court found that the Act “imposes an impermissible burden upon the exercise of a constitutional right,” and invalidated the provision authorizing capital punishment. *Id.*, at 572.

In this case, according to the court, Ms. Weinman’s decision to go to trial was “incompatible” with her later request for DOSA. RP 631-632.³ The court reasoned that “when [Ms. Weinman] did the trial, [she was] asserting that [she] had not committed a crime,” and thus should not be allowed to seek a treatment-based sentence. RP 631-632. This was improper.⁴

As in *Jackson*, the court’s decision penalized Ms. Weinman for exercising her constitutional right to trial. RP 631-632. This violated her Fourteenth Amendment right to due process and improperly burdened her state and federal jury trial rights.⁵ *Id.*

² The court summarized the provision’s effect as follows: “[T]he defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die.” *Id.*, at 581.

³ The court also claimed that Ms. Weinman was “asserting that she didn’t need the system’s help... in getting treatment because [she was] doing it on [her] own.” RP 631-632. This is inaccurate. Ms. Weinman had successfully embarked on a course of sobriety prior to conviction; however, she did not claim that she could remain sober without assistance, especially upon being sentenced to prison. RP 494-495.

⁴ Furthermore, Ms. Weinman did not deny delivering methamphetamine on two of the three occasions. RP 510-513.

⁵ The error may be raised for the first time on review as a manifest error affecting a constitutional right. RAP 2.5(a)(3).

The trial court’s position—that going to trial was “incompatible” with a DOSA request—was improper. RP 631-632; *Id.* Under *Jackson*, the court was barred from imposing a greater penalty just because Ms. Weinman was “ingenuous enough to seek a jury acquittal.” *Id.*, at 581.

The court denied Ms. Weinman’s DOSA request based on impermissible factors. *Id.* Her sentence must be vacated, and the case remanded for a new sentencing hearing. *State v. Grayson*, 154 Wn.2d 333, 337-38, 111 P.3d 1183 (2005).

The hearing should be before a different judge. *State v. Solis-Diaz*, 187 Wn.2d 535, 541, 387 P.3d 703 (2017) (addressing remand for consideration of youth as a mitigating factor.). Under the appearance of fairness doctrine, a party may seek judicial reassignment “where the trial judge ‘will exercise discretion on remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion as to the merits, or otherwise prejudged the issue.’” *Id.*, at 540. Judge Sparks’ comments suggest that “he has already reached a firm conclusion about the propriety of a [DOSA] sentence in this case and may not be amenable to considering [DOSA] with an open mind.” *Id.*

CONCLUSION

For the foregoing reasons, Ms. Weinman's sentence must be vacated and the case remanded for a new sentencing hearing before a different judge.

Respectfully submitted on February 2, 2018,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 2, 2018.



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